IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1302 of 2005
with
Civil Application No.1769 of 2005

Vithal Yeshwant Patil, deceased
by heirs:
1.Yeshwant Vithal Patil & ors. ..Appellants

vs.

1. Dattu Yeshwant Jadhav and ors. ..Respondents

Shri A.Y.Sakhare, Sr.Counsel i/b Shri K.S.Patil for appellants.
Shri Madhav Jamdar for respondents.

CORAM: S.C.DHARMADHIKARI J.
25th **July, 2007**

P.C.

1. Heard Shri Sakhare, learned Senior Counsel appearing for the appellants/original plaintiffs and Shri Jamdar appearing for the respondents/original defendants.

2. Shri Sakhare submits that the substantial question of law that would arise in this appeal is after holding that the appellants/plaintiffs' predecessor in title Vithal was in possession of the earlier suit property and which finding was rendered in the suit filed by Vithal for injunction simplicitor and confirmed in appeal, then, ignoring that judgment and decree by the Courts below, is an error which goes to the root of the matter. If the

fact regarding possession is proved and undisputed, then, it was upon the original defendant Dattu to have pleaded and proved that he came in possession of the property lawfully and which fact having not been proved, the burden has not been discharged. In such circumstances, the suit could not have been dismissed.

3. With the able assistance of Shri Sakhare, I have gone through the impugned judgment so also the judgment of the Appeal Court in Civil Appeal no.158 of 1980 which has been heavily relied upon.

4. I am unable to accept the contention of Shri Sakhare for more than one reason.

5. The appellants' predecessor in title Vithal filed a suit against Dattu Yeshwant Jadhav being civil suit no.280 of 1988 in the Court of the Civil Judge, Jr.Dn., Vite. This suit admittedly was for injunction simplicitor.

6. The suit was decreed with costs by the learned Civil Judge, Jr.Dn., and Dattu carried the matter in appeal. The Appellate Court allowed Dattu's appeal and observed that the plaintiff Vithal cannot succeed in getting the permanent injunction against Dattu who is the owner of the

land merely on the strength of his possession. In other words, when Vithal pleaded an agreement of sale in respect of the suit property executed in the year 1965 in his favour, remedy of Vithal, according to the lower Appellate Court, was to file a substantive suit seeking specific performance of that agreement and thereafter further relief. That having not been done, the suit filed for injunction simplicitor could not be decreed.

7. The judgment and decree of the lower Appellate Court dated 12th March, 1982 in Civil Appeal no.158 of 1980 must be read in its entirety and so read, it is abundantly clear that a misconceived suit could not have been decreed.

8. Now relying upon the judgment and some observations therein, Shri Sakhare would contend that the courts below could have decreed the instant suit filed by the appellants as well.

9. The instant suit, according to the lower Appellate Court, was once again nothing but containing the same reliefs namely, to protect possession. This was not a suit seeking specific performance in as much as that remedy was lost by efflux of time. Once again Vithal

knocked the doors of the Court to protect his possession against the real owner and on the strength of the judgment and decree which was rendered against him.

10. The courts below committed no error in not only relying upon the decree passed in favour of Dattu but also that the possession of the suit property was lost by Vithal due to subsequent events. Even while decreeing the suit filed earlier by the appellants' predecessor in title, the observation was that owing to tenancy proceedings, the possession is not continuous and uninterrupted. A stray entry in the revenue record in "cultivation column" for a particular year would not establish continuous possession. In such circumstances, when the possession was not continuous as found in the earlier litigation, the courts below committed no error in relying upon the subsequent developments in as much as after the decree in Reg.Civil Appeal no.158 of 1980 Dattu sold land on 24th May, 1984. Similarly, the entries in the "cultivation column" which have been referred to in great details by the courts below would demonstrate that Vithal was not in possession as contended. The lower Appellate Court has referred to this aspect and has observed that together with the tenancy proceedings,. 7/12 extract would show that Vithal lost his status as a

cultivator of the suit land atleast after 1985-86. It is clear from the perusal of the lower Appellate Court's order that Vithal failed to produce 7/12 extract for the year 1985-86. Not producing the revenue record after 1984-85 means an adverse inference being drawn against the appellants' predecessor Vithal.

11. In such circumstances, the findings on the aspect of possession previously does not in any manner assist Vithal in claiming the same relief in the instant suit. The conclusion cannot be said to be vitiated in any manner nor can be termed as perverse. The findings recorded are consistent with the oral and documentary evidence produced on record. No substantial question of law arises. The fact of possession also has not been established despite several opportunities to do so were available to Vithal. The judgments rendered concurrently, therefore, do not warrant any interference under sec.100 of the Code of Civil Procedure as this is not a court which can reappreciate and reappraise the evidence on record.

12. The second appeal is summarily dismissed. In the light of the dismissal of the second appeal civil application does not survive and is accordingly disposed of.

(S.C.DHARMADHIKARI J.)